Sayandrapandian a/l Muthusamy v Vivekananda a/l MS Murugiah Pather (Chairman, Ipoh Hindu Devasthana Paripalana Sabah Sri Maha Mariamman Temple) & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO AA-22NCvC-55–08 OF 2020
SU TIANG JOO JC
16 FEBRUARY 2021

Unincorporated Associations — Societies — Expelled as life member — Whether plaintiff's action premature — Whether internal remedy ought to be exhausted first — Whether plaintiff's attendance at annual general meeting interfered with sub judice principle — Rules of Court 2012 O 33 r 2 — Societies Act 1966 s 40

This was an application by the defendants ('encl 7') pursuant to O 33 r 2 of the Rules of Court 2012 ('the ROC') and/or the court's inherent jurisdiction for a question and/or issue to be heard before the trial of the action. The plaintiff was expelled as a 'life member' of the society by the name of Ipoh Hindu Devasthana Paripalana Sabah Sri Maha Mariamman Temple ('Sabah'). He commenced this action against the 18 named defendants in this suit, the committee members of Sabah for, inter alia: (a) a declaration that he was entitled to be re-appointed as a life member of Sabah; (b) for an order that the defendants who comprised the committee of Sabah had acted ultra vires ant that the decision to expel him was null and void; (c) that the current committee be dissolved with a protem committee to be appointed until an extraordinary general meeting can be held to appoint a new committee; and (d) damages and any other relief deemed fit by the court. In their defence, the defendants pleaded that the plaintiff's action was premature and misconceived for failing to comply with s 40 of the Societies Act 1966 ('the SA') and art 12(4) of the Constitution of Sabah to the effect that the plaintiff ought to first exhaust his right of appeal to the General Body of Sabah and to the Registrar of Societies. The domestic remedy, according to the defendants, was in the form of art 12(4)(v) of the Constitution of Sabah which allowed a member who had been suspended or expelled to appeal to the General Body of Sabah, which the defendants in their written submissions submitted was the annual general meeting ('AGM'). All the defendants save for the 12th defendant ('17 defendants') then filed this encl 7. In the meantime, the plaintiff was not allowed to attend the AGM on 30 December 2020 to put forward his appeal to the General Body. The issue in this application was whether the plaintiff who was expelled as a member of a society could commence an action without complying with s 40 of the SA.

Held, dismissing the defendants' application ('encl 7') with costs:

(1) The court was of the view that the defendants should not be allowed to blow hot and cold or in other words, they should not be allowed to approbate and reprobate. The 17 defendants should not be allowed to succeed on an application grounded on a premise that the plaintiff should first appeal to the General Body in the form of the AGM of the society but on the other hand refuse the plaintiff the right to attend the AGM to present his appeal. The attendance of the plaintiff to the AGM would not in any way amount to an interference in the administration of justice for the sub judice principle as mentioned by the defendants. Whilst the 17 defendants averred that they would hold an extraordinary general meeting to determine the plaintiff's appeal after a decision of this encl 7, the court was of the view that it was self-serving and lacked in bona fides. The court was satisfied that the refusal to allow the plaintiff to make his appeal to the General Body of Sabah, a position which the defendants themselves had claimed ought to be the correct position in law pursuant to the constitution of the society they represent, had seriously and fundamentally undermined the premise of their application in this encl 7 (see paras 27–28 & 30–33).

(2) Further, besides the issue of reinstatement as a life member, the plaintiff claimed that there was abuse of power on the part of the committee members in causing him to be expelled and with them having acted ultra vires the bylaws of Sabah. The court was of the view that these claims which would be fact sensitive, would not be resolved with an answer to the question posed in Annexure A to encl 7 (see para 33).

[Bahasa Malaysia summary

Ini adalah permohonan oleh defendan ('lampiran 7') menurut A 33 k 2 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan/atau bidang kuasa mahkamah sedia ada untuk soalan dan/atau isu yang akan didengar di dalam tindakan ini. Plaintif telah dipecat dari 'ahli seumur hidup' untuk pertubuhan Kuil Hindu Devasthana Paripalana Sabah Sri Maha Mariamman ('Sabah'). Dia telah memulakan tindakan ini terhadap 18 defendan yang dinamakan dalam saman ini, iaitu ahli-ahli jawatankuasa Sabah untuk, antara lain: (a) perisytiharan bahawa dia berhak untuk dilantik semula sebagai ahli seumur hidup Sabah; (b) bagi suatu perintah bahawa defendan-defendan yang terdiri dari ahli-ahli jawatankuasa Sabah kerana bertindak secara ultra vires bahawa keputusan untuk memecatkannya adalah terbatal dan tidak sah; (c) bahawa jawatankuasa semasa dibubarkan dengan jawatankuasa protem dilantik sehingga mesyuarat agung luar biasa boleh diadakan untuk melantik jawatankuasa baru; dan (d) ganti rugi dan apa-apa relif lain yang difikirkan sesuai oleh mahkamah. Di dalam pembelaannya, defendan-defendan memplidkan bahawa tindakan plaintif adalah pramatang dan gagal mematuhi s 40 Akta Pertubuhan 1966 ('AP') dan perkara 12(4) Perlembagaan Sabah yang mana plaintif sepatutnya

mengemukakan rayuan kepada Badan Am Sabah dan Pendaftar Pertubuhan terlebih dahulu. Remedi domestik, menurut defendan, adalah terkandung di dalam perkara 12(4)(v) Perlembagaan Sabah yang membenarkan seseorang ahli yang telah digantung atau dipecat untuk merayu kepada Badan Am Sabah, yang defendan di dalam hujahan bertulis mereka adalah mesyuarat agung tahunan ('AGM'). Semua defendan kecuali defendan ke-12 ('defendan 17') kemudiannya memfailkan lampiran ini. Sementara itu, plaintif tidak dibenarkan menghadiri AGM pada 30 Disember 2020 untuk mengemukakan rayuannya kepada Badan Am. Isu dalam permohonan ini adalah sama ada plaintif yang dipecat sebagai ahli persatuan boleh memulakan tindakan tanpa mematuhi s 40 AP.

Diputuskan, menolak permohonan defendan-defendan ('lampiran 7') dengan kos:

(1) Mahkamah ini berpendapat bahawa defendnan-defendan sepatutnya tidak dibenarkan untuk bertindak pasti dengan pendiriannya. 17 defendan tersebut tidak sepatutnya dibenarkan permohonan ini atas alasan bahawa plaintif sepatutnya merayu terlebih dahulu kepada Badan Am di dalam AGM tetapi pada masa yang sama menghalang plaintif untuk menghadiri AGM tersebut. Kehadiran AGM tersebut tidak menyebabkan pelanggaran keadilan atau subjudis seperti yang dihujahkan defendan-defendan. Mahkamah mendapati bahawa 17 defendan tersebut bersikap mementingkan diri dan tidak bona fide. Mahkamah ini berpuas hati bahawa keengganan defendan-defendan untuk membenarkan plaintif membuat rayuan terhadap Badan Am Sabah telah menyalahi permohonan lampiran 7 ini (lihat perenggan 27–28 & 30–33).

(2) Seterusnya, selain isu melantik semula sebagai ahli seumur hidup, plaintif mendakwa bahawa terdapat pencabulan kuasa di pihak ahli jawatankuasa yang menyebabkan dia dipecat yang menyalahi perundangan Sabah. Mahkamah ini mendapati bahawa fakta-fakta ini tidak sepatutnya dijawab seperti di Lampiran A kepada lampiran 7 (lihat perenggan 33).]

Cases referred to

Datuk Pasamanickam & Anor v Agnes Joseph; R Narayanan Samy v Agnes Joseph [1980] 2 MLJ 92, FC (refd)

Datuk Wira SM Faisal bin SM Nasimuddin Kamal v Datin Wira Emilia binti Hanafi dan lain-lain [2018] MLJU 135; [2018] 7 CLJ 290, HC (refd)

Express Newspaper plc v News (UK) Ltd and others [1990] 3 All ER 376, Ch D (refd)

Iftikar Ahmed Khan v Perwira Affin Bank Bhd [2017] MLJU 1765; [2018] 1 CLJ 415, FC (refd)

Lee Tak Suan & Anor v Tunku Dato Seri Shahabudin bin Tunku Besar Burhanuddin & Ors [2009] 4 MLJ 759; [2009] 4 CLJ 365, FC (refd)

A *Shafie bin Bakri & Ors v Dr Hassan bin Yusoff & Ors* [2018] MLJU 1295; [2018] AMEJ 1120, HC (refd)

Legislation referred to

Constitution of the State of Sabah art 12(4)(v)
B Rules of Court 2012 O 33 r 2
Societies Act 1996 s 40

Sundarajan s/o Sokalingam (Sundrajan & Assoc) for the plaintiff.
Mathialagan s/o Mathuramuthu (Saravanabavan s/o Mathialagan with him) (Madhi Param & Co) for the defendants.
C *Kaladevi d/o Chandrasekharan (K Devi & Assoc) for the 12th defendant.*

Su Tiang Joo JC:

D INTRODUCTION

[1] The plaintiff was expelled as a 'Life Member' of the society by the name of Ipoh Hindu Devasthana Paripalana Sabah Sri Maha Mariamman Temple ('Sabah').
E

[2] He commenced this action against the 18 named defendants who are the committee members of Sabah for, inter alia, a declaration that he is entitled to be re-appointed as a Life Member of Sabah, for an order that the defendants
F who comprised the committee of Sabah had acted ultra vires and that the decision to expel him is null and void, that the current committee be dissolved with a protem committee to be appointed until an extraordinary general meeting can be held to appoint a (new) committee, damages and any other relief deemed fit by the court.

G

[3] In their defence (encl 5), the defendants right at the outset (in para 1) pleaded that the plaintiff's action is premature and misconceived for failing to comply with the Societies Act 1966 ('the SA'), to wit s 40 thereof and the Constitution of Sabah, to wit, cl 12(4) thereof (paras 8 and 13–18) to the effect
H that the plaintiff ought to first exhaust his right of appeal to the General Body of Sabah and to the Registrar of Societies.

APPLICATION

I **[4]** All the defendants save for the 12th defendant ('17 defendants') applied (encl 7) pursuant to O 33 r 2 of the ROC 2012 and or the court's inherent jurisdiction for a question and or issue to be heard before the trial of the action.

[5] Order 33 r 2 provides that:

Time of trial of questions or issues (O 33 r 2)

The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[6] The question postulated by the 17 defendants which is sought to be tried is set out in Annexure A to their application (encl 7). It is reproduced hereunder:

LAMPIRAN

(A)

LAMPIRAN (A)

SOALAN DAN/ATAU ISU YANG DICADANGKAN UNTUK DIBICARAKAN

[Menurut Aturan 33 Kaedah 2 — Kaedah-Kaedah Mahkamah 2012]

1. Sama ada pihak Plaintif yang merupakan ahli yang dipecat boleh memulakan tindakan ini di Mahkamah tanpa mematuhi *Seksyen 40 Akta Pertubuhan 1966* yang menyatakan seperti berikut:

40. Decision of Disputes.

(1) A dispute between —

(a) *a member* of subscriber or person claiming through a member or a subscriber or under the rules of a registered society and the *society or an office-bearer thereof*; and

(b) any person aggrieved who has ceased to be a member of a registered society or any person claiming through such person aggrieved, and the society or an office-bearer thereof,

Shall be decided in the manner directed by the rule of the registered society; and the decision so given shall be binding and conclusive on all parties without appeal, and shall not removeable to any court or restrainable by injunction, and application for the enforcement thereof may be made to a Sessions Court.

(2) The parties to dispute involving a registered society may by *consent refer the dispute to the Registrar.*

[7] In essence the issue is whether the plaintiff who was expelled as a member of a society can commence an action without complying with s 40 of the Societies Act 1996 ('SA') the provisions of which was set out in the question postulated in Annexure A.

[8] The 17 defendants' application (encl 7) was supported by an affidavit (encl 8).

[9] The plaintiff objected to the application and filed an affidavit in reply (encl 10).

[10] Written submissions were filed by the applicants (encl 13) and the plaintiff (encl 19). Oral submissions by both parties were presented on 7 December 2021. Counsel for the 12th defendants ('D12' adopted the submissions of counsel for the plaintiff.

[11] The plaintiff raised a preliminary objection that counsel for the 17 defendants, Mr Mathialagan cannot act for all the defendants save for D12 who is represented by Ms Kaladevi. This preliminary objection was dismissed and the court adjourned the decision for the substantive application (encl 7) to 5 January 2021.

5 January 2021

[12] On 5 January 2021, the court deferred giving decision because by letter dated 31 December 2020 (encl 21) the plaintiff brought to the attention of the court some developments in the society which the court felt was relevant for the disposal of encl 7 as will become apparent later.

[13] Although, the 17 defendants submitted that the decision ought to be delivered, the court directed that the averments contained in the letter of 31 December 2020 are to be reduced into the form of an affidavit with the 17 defendants given the right to reply thereto.

[14] The plaintiff proceeded to file his additional affidavit (encl 22) with the defendants filing affidavits in reply (encls 23 and 26).

Post 5 January 2021

[15] From a reading of the various affidavits referred to above and the submissions and after hearing the oral submissions, it can be discerned that in summary, the 17 Defendants' position in support of their application in encl 7 is that the plaintiff in his pursuit for relief in having been expelled by a society, to wit, the Ipoh Hindu Devasthana Paripalana Sabah Sri Maha Mariamman Temple, *ought to first exhaust the domestic remedy of first appealing to the general body of the society, before approaching the court.* (Emphasis added.)

[16] The domestic remedy, according to the 17 defendants, is in the form of art 12(4)(v) of the Constitution of Sabah which allows a member who has been suspended or expelled to appeal to the General Body of Sabah, which the defendants in their written submissions (encl 13 para 4.11) submit is the annual general meeting ('AGM').

[17] Clause 12(4)(v) of the Constitution of Sabah (encl 5 para 8) is reproduced below:

> Functions and Powers of the Committee 'suspend or expel any member if the Committee is satisfied that the member has acted in a manner detrimental to the interests of the Sabah, provided always that prior to such suspension or expulsion the Committee shall give such member an opportunity to give reasons, if any, why such disciplinary action should not be taken against him. The decision of the Committee after considering the reason, if any shall be final and conclusive *subject to appeal to the General Body.*

[18] Therefore, the 17 defendants submit that the plaintiff's action is premature.

[19] Reliance was placed upon the Federal Court authority of *Lee Tak Suan & Anor v Tunku Dato Seri Shahabudin bin Tunku Besar Burhanuddin & Ors* [2009] 4 MLJ 759; [2009] 4 CLJ 365 for the principle that the constitution of the society operates as a contract between the club or as in our case, the society, and its members and between the members inter se and therefore, the member ought to comply with the same.

[20] With the Constitution of Sabah having an avenue for the plaintiff to appeal to the General Body in the form of an annual general meeting, the 17 defendants took out their application (encl 7) for the question in Annexure A to be decided as they felt that an answer in the affirmative will resolve or substantially resolve the plaintiff's purported premature action.

[21] Reliance was placed by the 17 defendants on the Federal Court case of *Datuk Pasamanickam & Anor v Agnes Joseph; R Narayanan Samy v Agnes Joseph* [1980] 2 MLJ 92 and the High Court case of *Shafie bin Bakri & Ors v Dr Hassan bin Yusoff & Ors* [2018] MLJU 1295; [2018] AMEJ 1120 for the principle that a party must first exhaust the internal remedy provided before approaching the court, a principle that is consonant with the statutory provision of s 40 of the SA.

[22] As alluded to earlier, the 17 defendants' application (encl 7) was heard on 7 December 2020 with decision reserved to 5 January 2021.

[23] As on 7 December 2020, the annual general meeting ('AGM') of Sabah has yet to be held. However, an AGM for Sabah was scheduled for the 30 December 2020 but which was not brought to the court's notice at the time of the hearing of encl 7 on 7 December 2020.

[24] Surprisingly, as was brought to the court's attention later, the plaintiff

was *not allowed* to attend the AGM of 30 December 2020 to put forward his appeal to the General Body.

[25] This piece of information was in the aforesaid letter of 31 December 2020 (encl 21) the relevance of which is now obvious and hence the decision by the court on 5 January 2021 to defer its decision and for the plaintiff to lay this piece of evidence before the court in the form of an affidavit with the defendants to reply thereto. This, the plaintiff did by way of affidavit (encl 22).

[26] The 17 defendants in their affidavits in reply (encls 23 and 26) admitted that there was to be such an AGM on the 30 December 2020 but averred that fearing that they may be in contempt of court should they allow the plaintiff to make his appeal at the AGM, they had refused him permission to attend.

THE COURT'S ANALYSIS AND FINDINGS

[27] The court is of the view that the defendants should not be allowed to blow hot and cold or in other words, they should not be allowed to approbate and reprobate, see *Datuk Wira SM Faisal bin SM Nasimuddin Kamal v Datin Wira Emilia binti Hanafi dan lain-lain* [2018] MLJU 135; [2018] 7 CLJ 290 where Nordin Hassan J (now JCA) had referred to the case of *Express Newspaper plc v News (UK) Ltd and others* [1990] 3 All E R 376 where Nicholas Browne-Wilkinson VC at pp 383–384 explained that the principle simply means:

> A man cannot adopt two inconsistent attitudes towards another; he must elect between them, and having elected to adopt one instance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

A trawl through the law reports will yield a plethora of law reports for this principle.

[28] Simply put, the 17 defendants should not be allowed to succeed on an application grounded on a premise that the plaintiff should first appeal to the General Body in the form of the AGM of the society but on the other hand refuse the plaintiff the right to attend the AGM to present his appeal.

[29] As for the 17 defendants' alleged fear that they might be in contempt should they have allowed the plaintiff to attend the AGM when the proceedings herein are ongoing, this is a spurious argument for the 17 defendants to put forward when they in their defence (encl 5) aver that this was exactly what the plaintiff ought to have done. See *Iftikar Ahmed Khan v Perwira Affin Bank Bhd* [2017] MLJU 1765; [2018] 1 CLJ 415 where Abu Samah

Nordin FCJ speaking for the Federal Court at para [25] held:

> Parties are bound by their pleadings. This is a rule which will be strictly enforced by the Court.

[30] And, there is no prohibition on foot by way of any court order restraining the parties including the defendants from allowing the plaintiff to do so. It follows that to allow the plaintiff to attend the AGM would not in any way amount to an interference in the administration of justice for the sub judice principle made mention of by the 17 defendants in their affidavit (encls 23 and 26 para 8(iii)) to apply.

[31] For the same reason, whilst the 17 defendants aver in their affidavits in reply (encls 23 and 26) that they will hold an extraordinary general meeting to determine the plaintiff's appeal after a decision on (encl 7) has been handed down, with respect, this court finds it to be self-serving and lacking in bona fides.

[32] In the circumstances, the court is satisfied that the refusal to allow the plaintiff to make his appeal to the General Body of Sabah, a position which the 17 defendants themselves had wholeheartedly claim ought to be the correct position in law as per the constitution of the society they represent, has seriously and fundamentally undermined the premise of their application (encl 7).

[33] Further, besides the issue of reinstatement as a life member, the plaintiff claims that there was abuse of power on the part of the committee members in causing him to be expelled and with them having acted ultra vires the bye laws of Sabah. The court is of the view that these claims which would be fact sensitive, would not be resolved with an answer to the question posed in Annexure A to encl 7.

CONCLUSION

[34] With the COVID-19 pandemic on foot, the decision of this court was delivered by way of email on 3 February 2021, the decision being that the application by the 17 defendants (encl 7) was dismissed with costs of RM5,000 subject to allocatur and to be paid forthwith with directions for parties to proceed to obtain pre-trial directions for the matter to be set down for trial. By notice of appeal dated 9 February 2021 (encl 27) 16 of the 17 defendants have appealed against the decision made on 3 February 2021 and the grounds of judgment herein are put up to facilitate the appeal.

A EPILOGUE

[35] The irony of the situation at hand is that unlike the doors to the AGM of Sabah which was shut by the 17 defendants for the plaintiff to make his appeal, the doors to the Court of Appeal will be open to the 16 defendants to make their appeal.

B

Application dismissed with costs.

Reported by Muhamad Azham Marwan

C

D

E

F

G

H

I